

NTSB Order No. EA-5239

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of June, 2006

Respondent.

Docket SE-17295

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on July 14, 2005, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator, finding that respondent had violated 14 C.F.R. 91.13(a) of the Federal Aviation Regulations.²

² Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another. In this case, the Administrator has charged

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We deny the appeal.

Respondent was the pilot-in-command of a Piper Model PA 31-350 on February 21, 2004, at McCarran Las Vegas Airport.³ Respondent was picking up two passengers at the Executive Air Aviation (EAA) general aviation terminal. He had a co-pilot, Benjamin Hoffman, on board in the right seat. According to the Administrator's witnesses, when respondent landed, he did not follow the "Follow Me" truck⁴ to EAA, nor did he follow the hand directions of other linemen who were sent out to direct him where to park. Instead, he taxied around these individuals and parked (according to the various witnesses) somewhere between 10 to 30 feet from the front of the terminal, an area that is not used for aircraft parking due to obvious safety concerns. Transcript (Tr.) at 57.⁵

The supervisor of the EAA facility, Cris Hilsabeck, confronted respondent with his failure to follow parking instructions, and his subsequent attempt to leave without paying

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respondent with reckless conduct.

³ The Order of Suspension so describes the aircraft. In the transcript, however, the aircraft seems to be described as a Navajo, which is PA 31-325. The difference is not material.

⁴ This truck, which has a large sign on the back labeled "Follow Me," is used to guide airplanes to an appropriate parking area on the ramp.

⁵ Counsel for respondent argued that this information was prejudicial and should not be included in the record because it was irrelevant to the charge. The law judge agreed with the Administrator, as do we, that this preface to the violation charged in the complaint is not relevant to that violation and does not aggravate it, but simply sets the scene for what

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the ramp fee. Respondent got into the aircraft and prepared to depart. Mr. Hilsabeck approached the aircraft and attempted to talk to respondent. Mr. Hilsabeck testified that respondent gave him a false name and otherwise ignored him. Mr. Hilsabeck stepped in front of the aircraft in an attempt to prevent respondent from leaving and, according to his testimony and that of three other EAA employee percipient witnesses, raised his crossed arms in the standard "stop" signal.

Respondent started both engines and released the brakes. The aircraft moved slowly towards Mr. Hilsabeck, who was standing about 3 feet away.⁶ The nose cone of the aircraft hit Mr. Hilsabeck. There was no doubt that respondent could see Mr. Hilsabeck from his seat in the aircraft.⁷ Indeed, Mr. Hilsabeck said the two made eye contact both before and after the aircraft hit him. After the first "bump," Mr. Hilsabeck stepped back a few feet. According to the EAA witnesses, respondent again released the brakes and the aircraft again moved slowly towards Mr. Hilsabeck. He was hit again, and then the aircraft made a sharp left turn. Coincidentally, Mr. Hilsabeck slipped just at that time, having the effect of ducking under the wing. This prevented him from being hit yet again. The Administrator

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happened later.

⁶ Mr. Hilsabeck and other witnesses estimated the distance as 3 feet. One other witness said Mr. Hilsabeck was about 10 feet in front of the aircraft.

⁷ Mr. Hilsabeck is 6'4" tall.

introduced an expert witness to testify to his belief that respondent's behavior was reckless.

Respondent had a very different version of events. According to him and his co-pilot, they saw no "Follow Me" truck and no linemen to direct them where to park. Because he had talked by radio to EAA and told them that he wanted a very quick turnaround and EAA had said okay, respondent taxied up to the terminal. He says, however, that he parked about 70 feet from the building. Mr. Hilsabeck approached him irate, but respondent "kept his cool." Nothing was said about a landing fee. When ready to depart, he saw Mr. Hilsabeck about 10 feet in front of the aircraft. His hands were at the center of his chest. Respondent made a hand signal to him to get out of the way, which Mr. Hilsabeck did not acknowledge. Respondent released the brakes and Mr. Hilsabeck moved backwards. Seeing enough room, respondent made a left turn, certain Mr. Hilsabeck was clear of the aircraft. At no time, he testified, did the aircraft strike Mr. Hilsabeck. Mr. Hoffman, the co-pilot, confirmed this testimony.

Another witness for respondent (but one who did not witness the events) testified that it would be impossible for the events to transpire as the EAA employees testified because Mr. Hilsabeck would have been badly hurt. With the distances as described by the Administrator's witnesses, he testified, on the turn Mr. Hilsabeck would have been "chopped up." Tr. at 198. He also testified that no one would let himself be hit twice.

The law judge ruled in favor of the Administrator. Faced with two significantly different versions of events, the law judge considered the behavior and demeanor of the witnesses, their interests and relationship to respondent, and the consistencies or discrepancies in testimony. He found the Administrator's witnesses more credible.

On appeal, respondent makes two arguments, neither of which merits substantial discussion. First, he argues that inconsistent witness testimony requires further review. However, the inconsistent testimony does not relate to the incident itself - the actual striking - and is irrelevant to it. Further, the inconsistencies are insubstantial. And finally, it is the law judge's responsibility to assess the witnesses and their testimony and determine what testimony is more reliable. Often it is not exact, as eyewitness accounts are not perfect. Yet, the law judge is *required* to decide what version of events he finds more credible. And we do not overturn his analysis unless it is arbitrary or capricious. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). See also Administrator v. Jones, 3 NTSB 3649, 3651 (1981) (that the law judge's finding accepted the testimony of the accident investigator, rather than accounts of those more directly involved, is not error, unless the law judge's credibility determinations were arbitrary and capricious).

In connection with this argument, respondent suggests that an experienced lineman would not let himself be struck by an aircraft, thus supporting his argument that the law judge's

credibility finding was in error. We cannot agree. Not only were there percipient witnesses - unbiased in the law judge's view - but it is also possible that Mr. Hilsabeck may have been stubborn in his refusal to move. As the law judge noted:

Whether or not [Mr. Hilsabeck] should have taken that action is beside the point, in my view. Even if he shouldn't have been there, the Respondent should not have attempted to move him out of the way by hitting him with the aircraft.

Tr. at 235.

Respondent's other argument is frivolous. Counsel argues that the law judge ignored Board precedent in failing to consider respondent's use of his certificate in reviewing the Administrator's proposed sanction. We are confident that respondent's experienced counsel is aware that the case cited - Administrator v. Whittaker, 1 NTSB 1982 (1972) - was long ago overruled. Indeed, we have specifically rejected consideration of a respondent's use of his certificate when considering sanction. See, e.g., Administrator v. Mohumed, 7 NTSB 696, 700 (1988), and cases cited there (consideration of the adverse economic impact of the sanction on the individual is directly contrary to established precedent). See also Administrator v. Williams, NTSB Order No. EA-3588 (1992).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 180-day suspension of respondent's certificate shall begin 30 days after the service date indicated on this opinion and order.⁸

ROSENKER, Acting Chairman, and HERSMAN and HIGGINS, Members of the Board, concurred in the above opinion and order.

⁸ For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. 61.19(g).